

**T-West Sales & Service, Inc. d/b/a Desert Toyota and International Association of Machinists and Aerospace Workers, Local Lodge 744, AFL-CIO.** Cases 28-CA-17904 and 28-CA-18065

December 23, 2005

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On November 13, 2002, Administrative Law Judge Lana Parke issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply. The General Counsel also filed limited cross-exceptions and a supporting brief, to which the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.

**I. INTRODUCTION**

The Respondent operates a new and used car dealership and service facility in Las Vegas, Nevada. The issues in this case concern the Respondent's reactions in early 2002 to the Union's organizational efforts aimed primarily at the Respondent's automobile service technicians. The judge found, and we agree, that the Respondent violated Section 8(a)(1) when it (1) maintained an overly broad no-solicitation rule,<sup>2</sup> (2) coercively interrogated the service advisors, who work with the technicians, solicited them to report on others' union activities, and created an impression of surveillance,<sup>3</sup> (3) coercively

interrogated, solicited grievances from, and impliedly promised benefits to service technician Jorge Galindo, and (4) coercively interrogated service technician Thomas Pranske twice and made statements to Pranske linking Galindo's discharge to his support of the Union.<sup>4</sup> We also agree with the judge, for the reasons set out below, that the Respondent violated Section 8(a)(3) and (1) when it discharged Galindo. Unlike the judge, however, we find that the coercive effects of the Respondent's unlawful conduct can be alleviated by the use of the Board's traditional remedies. Thus, we reverse the judge's recommendation that a *Gissel*<sup>5</sup> bargaining order issue.<sup>6</sup>

**II. DISCHARGE OF JORGE GALINDO**

In January 2002,<sup>7</sup> the Union commenced an organizing campaign among approximately 130 auto dealerships and auto repair shops in Las Vegas, Nevada. On January 13, the Union held an information meeting that four of the Respondent's employees, including Jorge Galindo, attended. At the end of the meeting, Galindo signed an authorization card. In the following weeks, Galindo arranged and attended meetings between union representatives and others of the Respondent's employees. At each of these meetings, additional employees signed authorization cards.

During this time, the Respondent's supervisors and managers engaged in conduct that we have found, in agreement with the judge, violated Section 8(a)(1). Much of that conduct concerned Galindo. Early in the Union's campaign, Service Directors Burke or Casucci told service advisors that Galindo was promoting the Union and taking employees to union meetings. In mid-March, the Respondent's general manager, Bob Carmendy, solicited grievances from Galindo, implicitly

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We note that the Respondent excepted to the judge's finding that the maintenance of the rule violated Sec. 8(a)(1) but did not file exceptions to the judge's findings that the rule was unlawfully promulgated and discriminatory. Accordingly, we adopt the latter findings *pro forma* in the absence of exceptions.

<sup>3</sup> The service advisors were neither part of the unit in which the Union claimed majority support nor part of the unit the judge found appropriate, despite the Respondent's argument that they be included. Nevertheless, the unfair labor practices were committed early in the Union's organizational campaign at a time when the service advisors were still considered to be potential targets of the campaign. Thus, the unlawful statements made to them directly involved their rights to engage in Sec. 7 activities.

In finding a violation for creating the impression of surveillance, we rely on evidence that the service director, Pat Burke, or his successor

Vincent Casucci told service advisors that technician Jorge Galindo was promoting the Union and taking people to a union meeting. We view this conduct as separate and distinct from Burke's solicitation of service advisors to report on technicians' union activities.

Member Schaumber agrees that the Respondent, through Burke, unlawfully solicited the service advisors to report on others' union activities. The General Counsel alleged that Burke's solicitation created an impression of surveillance and the judge also found that violation. Member Schaumber finds it unnecessary to pass on whether that solicitation also violated Sec. 8(a)(1) under that theory.

<sup>4</sup> Reconditioning Manager Tony Zita committed these acts. The Respondent denied Zita's supervisory status. The judge found, and we agree, that Zita was a supervisor within the meaning of Sec. 2(11). In support of this finding, we rely only on the uncontradicted testimony that he had authority to hire and actually did hire employees. See *Three Sisters Sportswear Co.*, 312 NLRB 853, 864 (1993).

<sup>5</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

<sup>6</sup> Because of our disposition of the judge's recommended remedial bargaining order, we do not pass on the judge's appropriate unit finding.

<sup>7</sup> All dates are 2002, unless otherwise noted.

promised benefits, and asked him what he thought about the Union. Galindo told Carmendy that he had attended the first union meeting. In February or March, Supervisor Tony Zita asked Pranske if either he or Galindo were involved with the Union. Then, on March 21, Zita called Pranske into his office where Casucci was also present. The supervisors asked Pranske if Galindo was involved in organizing the Union. When Pranske said that Galindo was, Casucci responded, “[t]hat’s what we needed to know.” Later that same day, Zita told Pranske that Carmendy said that the Respondent would have to fire Galindo.

The next day, March 22, the Respondent terminated Galindo’s employment. Upon arriving at work, Galindo was called into Casucci’s office. Casucci told Galindo, “I’m going to have to let you go because we’re trying to reduce costs by April 1st, and . . . you’ve gotten to a point where you [have a] bad attitude and [your] work performance is bad and productivity.” Casucci did not get any more specific. Casucci also criticized Galindo’s work on two different cars.<sup>8</sup> Casucci said the matter was not personal, but that “it came from up front.” The following day, Zita told Pranske that the problem with the Union was taken care of.

On Galindo’s termination form, Casucci noted as “reason[s] for termination” both “Reduction in Force” and “Other.” He elaborated by adding “overall job performance—decline in job performance, attitude.” On the “employee evaluation” portion of the form, Casucci gave Galindo generally positive ratings, including “satisfactory” ratings for both cooperation and quality of work. No “unsatisfactory” rating was marked. As to “rehire,” Casucci marked “yes.”

At the hearing, Casucci offered additional reasons for having terminated Galindo. He testified that, although he was unhappy with Galindo and his attitude as early as November 2001, he did not decide to terminate Galindo until the latter part of March.<sup>9</sup> He was “furious” at Galindo for going “over his head” at that time in approaching Carmendy to request a pay raise.<sup>10</sup> Casucci claimed that Galindo had a “very down, very dark” attitude and failed to “respond” to Casucci’s attempts at conversation, which Casucci perceived as a “total lack

and disregard of any respect towards [him].”<sup>11</sup> Casucci also testified that Galindo’s low labor hours were a performance concern, as was his customer service index (CSI) rating,<sup>12</sup> which ranked Galindo as third from the bottom in the Respondent’s shop for the year 2001. Summarizing, Casucci testified that he terminated Galindo “basically on his attitude, his CSI, and his labor hours.” During cross-examination, Casucci testified that he terminated Galindo because they “couldn’t communicate and couldn’t get along.” He also testified that he did not discuss Galindo’s CSI rating with him until the date of termination.<sup>13</sup>

The Respondent presented no evidence that other employees had been either disciplined or discharged for having bad attitudes, poor communication skills, or low CSI ratings. There is also no evidence that the two employees who had lower CSI ratings than Galindo were notified of their low ratings, much less subjected to discipline or discharged because of them.

On these facts, we find that the Respondent discharged Galindo in violation of Section 8(a)(3) and (1). Our analysis of whether the discharge violated the Act is governed by the test articulated in *Wright Line*.<sup>14</sup> Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.<sup>15</sup> See *Willamette Industries*, 341 NLRB 560, 562 (2004).

<sup>11</sup> Casucci testified that he discussed Galindo’s attitude with him, but the judge discredited that testimony. The Respondent did not except to that credibility finding.

<sup>12</sup> The CSI rating is a numerical score between 0 and 100, obtained through randomly distributed customer surveys. The surveys are not distributed by the Respondent, but by Toyota. The rating system is uniform among Toyota dealerships and service centers nationwide.

<sup>13</sup> The judge found that Casucci did not look at Galindo’s CSI rating until the latter part of March. The record clearly shows that Casucci monitored the CSI ratings weekly because he considered them extremely important. This inadvertent error does not affect our decision.

<sup>14</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>15</sup> Regarding the *Wright Line* analysis, Member Schaumber notes that the Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel’s initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer’s Foods, Inc.*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation analysis, Member Schaumber agrees with this addition to the formulation.

<sup>8</sup> According to Galindo, prior to this instance, Casucci had never complained to him about his attitude or his work on the cars.

<sup>9</sup> Despite this testimony, the record demonstrates that Casucci praised Galindo on several occasions in January and February, including calling Galindo his “top guy.”

<sup>10</sup> Galindo’s request was premised on his successful passing of two ASE certification tests. He requested the raise from Casucci three times without success before approaching Carmendy.

If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enf'd. mem. 99 F.3d 1139 (6th Cir. 1996).

Here, the General Counsel has met his burden to prove that Galindo's union activity was a substantial or motivating factor leading to his discharge. Galindo engaged in union activity by attending union meetings, signing an authorization card, and facilitating meetings between union officials and the Respondent's employees. The Respondent knew of this activity because (1) Galindo told Carmendy that he had attended a union meeting, (2) Burke or Casucci told service advisers that Galindo was a union supporter, and (3) through unlawful interrogation, Casucci confirmed that Galindo was involved in organizing the Union. The Respondent's animus is clear from its several violations of Section 8(a)(1), including those focused on Galindo's union activities.

The timing of the discharge also indicates that Galindo's union activities were a substantial or motivating factor leading to the discharge. Through its interrogation of Pranske, the Respondent confirmed Galindo's role in organizing the shop's employees on March 21. Upon learning this, Casucci stated, "[t]hat's what we needed to know." The very next day, Galindo was discharged. Although Casucci testified that he had been troubled by Galindo's attitude since November 2001, he did not decide to terminate Galindo until late March and did not do so until the day after he confirmed that Galindo was active in organizing the Union. See *National Steel Supply, Inc.*, 344 NLRB 973-974 (2005) (timing of adverse action found indicative of discriminatory motive where discipline did not issue until shortly after employer learned about union campaign and only one business day after interrogating employee about union activities).

For all these reasons, we find that the General Counsel has demonstrated that Galindo's union activity was a substantial or motivating factor leading to his discharge.

Therefore, under *Wright Line* the burden shifts to the Respondent to prove it would have taken the same action even in the absence of Galindo's union activity. We find that the Respondent has failed to carry this burden.

First, the Respondent has offered several different reasons for discharging Galindo. The termination form noted "reduction in force" as well as "decline in job performance, attitude" as reasons for the discharge. Casucci told Galindo that the Respondent needed to "reduce costs" as well as noting his alleged deficiencies in performance. Casucci also told Galindo that the decision came from "up front," or higher management. At the hearing, Casucci dropped the reduction in force and costs reasons, emphasizing instead Galindo's bad attitude, and deficiencies in performance, e.g., his low CSI score and low labor hours. He also changed the source of the decision to discharge Galindo from someone "up front" to himself when he provided two new personal reasons for the decision: Casucci's "fur[y]" at Galindo for going "over his head" by approaching Carmendy for a raise; and Casucci's perception, based on Galindo's failure to engage him in smalltalk, that Galindo lacked respect for him. By adding these makeweight reasons during the hearing, and thereby changing the source of the decision to discharge Galindo, it appears that the Respondent was simply making up its defense as it went along. Such a shifting of reasons has long been held to be a clear indicium of discriminatory or unlawful intent. See *C.D.S. Lines, Inc.*, 313 NLRB 296, 300 (1993); see also *Aratex Services*, 300 NLRB 115 fn. 9 (1990) (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)).

Second, Casucci's acknowledgment that he did not notify Galindo of his performance deficiencies until the moment of termination, despite his alleged longstanding concern, belies the Respondent's claim that they were the true reasons for his discharge. Similarly, the genuineness of Casucci's concerns about Galindo's performance and attitude is called into question by his contemporaneous praise of Galindo and by the favorable comments he made on Galindo's exit evaluation form about satisfactory cooperation and quality of work. Furthermore, there is no evidence that the two employees who had lower CSI ratings than Galindo were even notified of their low ratings, much less discharged because of them.

An employer, of course, has the right to determine when discipline is warranted and in what form. "It is well established that '[t]he [B]oard cannot substitute its judgment for that of the employer' and decide what constitutes appropriate discipline." *Detroit Paneling Systems*, 330 NLRB 1170, 1171 fn. 6 (2000) (quoting *Corriveau & Routhier Cement Block, Inc. v. NLRB*, 410 F.2d 347, 350 (1st Cir. 1969)). However, it is the role of the Board to evaluate whether the reasons the employer proffered for the discipline were the actual reasons or mere pretexts. *Id.* In this case, we find that the Respondent's

reasons were pretextual. Upon learning that Galindo was actively involved in the Union's organization campaign, Respondent decided to terminate him and groped for reasons to substantiate that decision. Having found that the asserted legitimate defenses for Galindo's discharge were pretextual, we find that the Respondent failed to prove by a preponderance of the evidence that it would have discharged Galindo even in the absence of his protected union activities. It therefore violated Section 8(a)(3) and (1).

#### REMEDY

The judge found, relying on *Gissel*, that the Respondent's unfair labor practices so tainted the atmosphere that the possibility of assuring a fair election was slight, and therefore that a bargaining order was warranted. Contrary to the judge, we find that a bargaining order is unnecessary in the circumstances presented here and that the Respondent's unlawful conduct can be adequately remedied through use of traditional remedies.

Under *Gissel*, the Board will issue a remedial bargaining order, absent an election, in two categories of cases. The first category is "exceptional" cases, those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. 395 U.S. at 613-614. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede election processes." *Id.* at 614. In the latter category of cases, the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and[, therefore,] employee sentiment once expressed [by authorization] cards would, on balance, be better protected by a bargaining order." *Id.* A *Gissel* bargaining order, however, is an extraordinary remedy. The preferred route is to provide traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by those remedies. *Aqua Cool*, 332 NLRB 95, 97 (2000).

*Hialeah Hospital*, 343 NLRB 391, 395 (2004).

"In determining the propriety of a remedial bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of dissemination among employees, and the identity and position of the individuals committing the unfair labor practices." *Garvey Marine, Inc.*, 328 NLRB 991, 993

(1999), *enfd.* 245 F.3d 819 (D.C. Cir. 2001). Accord: *Holly Farms Corp.*, 311 NLRB 273, 281 (1993), *enfd.* 48 F.3d 1360 (4th Cir. 1995), *cert. denied* in pertinent part 516 U.S. 963 (1995). After carefully considering these factors, we find that a remedial bargaining order is not proper in this case.

The Respondent committed a number of unfair labor practices. It maintained an unlawful no-solicitation rule. It unlawfully interrogated the service advisors, solicited them to report on other employees' union activities, and created an impression of surveillance.<sup>16</sup> Further, the Respondent twice interrogated Pranske about his union activities and those of others. It also interrogated Galindo, solicited grievances, and impliedly promised benefits to him. These violations, without more, would not make this a *Gissel* category II case requiring consideration of the need for a remedial bargaining order.

In this regard, the unit found appropriate by the judge had 31 employees.<sup>17</sup> It did not include the service advisors and there is no evidence that reports of the unfair labor practices committed against them were disseminated to unit employees. While other violations were aimed at unit employees, with the exception of the Respondent's promulgation and maintenance of an unlawful no-solicitation rule, none of these unfair labor practices occurred on a unit-wide basis. In fact, only two unit employees, Pranske and Galindo, were directly affected by them and there is no evidence that these unfair labor practices were disseminated beyond the single employee involved in each incident.<sup>18</sup>

However, the Respondent also unlawfully discharged Galindo, the principal employee organizer, and made statements to Pranske linking the discharge to Galindo's organizational activities. Clearly, threats of loss of employment and the actual discharge of an active union

<sup>16</sup> As noted, Member Schaumber finds it unnecessary to reach the impression of surveillance allegation.

<sup>17</sup> We do not pass on the judge's finding of an appropriate unit. Nevertheless, in reviewing the judge's recommendation to issue a bargaining order, we assume for the sake of argument that the unit found appropriate by the judge was an appropriate unit and that a majority of that unit signed valid authorization cards.

<sup>18</sup> This is distinguishable from the situation in *Aldworth, Inc.*, 338 NLRB 137, 151 (2002), where the employer's statements linking adverse employment actions to protected activity were widely disseminated during large group meetings.

Union Organizer James Rodehorst testified that three other formerly active union supporters declined to attend a union meeting after Galindo's discharge because they did not want to lose their jobs. The judge found that this testimony demonstrated the impact of the Respondent's actions. As the Respondent argued in its exceptions, that testimony was uncorroborated hearsay. We therefore give it little weight. At most, the testimony would only support a finding that a total of five unit employees were affected in any way by the Respondent's unlawful conduct. That is not a significant portion of the 31-employee unit.

supporter are “hallmark” violations frequently relied upon to support a bargaining order, but the commission of “hallmark” violations does not always allow for the imposition of this extraordinary remedy. See, e.g., *Pyramid Management Group, Inc.*, 318 NLRB 607, 609 (1995), enfd. mem. 101 F.3d 681 (2d Cir. 1996) (the unlawful discharge of two union supporters, in the absence of other hallmark violations, insufficient to support bargaining order in a 69-employee unit), and *Phillips Industries*, 295 NLRB 717, 718 (1989) (the unlawful discharge of two primary in-house union supporters, in the absence of other hallmark violations, insufficient in a 90-employee unit). Here, we find that, as in the cited cases, the discharge and threat did not impact a significant portion of the bargaining unit,<sup>19</sup> and the Respondent’s unlawful conduct, even though committed in some cases by high-ranking officials, can be adequately redressed by the traditional remedies provided herein.<sup>20</sup>

To be sure, any lingering effects due to the Respondent’s discriminatory discharge of Galindo will be remedied by the reinstatement and backpay we order today. Galindo’s reinstatement will undoubtedly send a strong message to both the Respondent and its employees that employer interference with its employees’ Section 7 ac-

tivities will not be tolerated. See *Abramson, LLC*, 345 NLRB 171, 177 (2005).<sup>21</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, T-West Sales & Service, Inc. d/b/a Desert Toyota, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a) and reletter the remaining paragraphs.

2. Substitute the following for relettered paragraph 2(c).

“(c) Within 14 days from the date of this Order, remove from its files any reference to Jorge Galindo’s unlawful discharge, and, within 3 days thereafter, notify him in writing that this has been done and that his unlawful discharge will not be used against him in any way.”

<sup>19</sup> Member Schaumber does not reach the issue of whether Zita’s remarks should be viewed as a “hallmark” violation because he would find in any event that a *Gissel* bargaining order is not appropriate here.

<sup>20</sup> Accord: *Hialeah Hospital*, supra, 343 NLRB at 395–396 (no *Gissel* bargaining order where the employer committed a retaliatory discharge and multiple 8(a)(1) violations, including threats, surveillance, promises of benefits, and removal of benefits, in a 12-employee unit); *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004) (no *Gissel* bargaining order where the employer, among other things, granted a unit-wide wage increase, discharged a leading union activist the day before the election, threatened employees with plant closure, and engaged in surveillance); and *Desert Aggregates*, 340 NLRB 289, 293–294 (2003) (no *Gissel* bargaining order where the employer unlawfully solicited and promised to remedy employee grievances and laid off for 3 months 2 leading union supporters in a unit of 11 employees). In each of these cases, the Board found traditional remedies adequate to redress more serious and more pervasive unfair labor practices than those committed by the Respondent here.

We note that, during the pendency of this case, the Union filed additional charges, alleging violations of Sec. 8(a)(1), (3), (4), and (5), against the Respondent. On the basis of the conduct found to be unlawful herein and the conduct alleged against the Respondent in *Desert Toyota*, Case 28–CA–18478 (*Desert Toyota II*), the Board authorized the General Counsel to seek 10(j) relief, including an interim bargaining order, against the Respondent. The United States District Court for the District of Nevada granted that relief on February 20, 2004. As more fully described in our decision in *Desert Toyota II*, 346 NLRB 132 (2005), also issued this day, of the many allegations against the Respondent in the second case, we find only a single 8(a)(1) violation. Even considering this additional unlawful conduct, we find that a remedial bargaining order is not appropriate in this case.

<sup>21</sup> Contrary to the majority, Member Liebman would find a *Gissel* bargaining order warranted in this case. In her view, the Respondent has committed hallmark violations, not only unlawfully discharging the primary union activist, Galindo, but also indirectly threatening another employee whom it questioned about Galindo’s union involvement. Threats of discharge and actual discharge of union activists are among the most flagrant interferences with Sec. 7 rights, and are likely to more enduringly disrupt election conditions than other unfair labor practices. See, e.g., *Aldworth Co.*, 338 NLRB 137 (2002); *Hialeah Hospital*, supra (Member Liebman dissenting in part, citing cases). Here, the discharge of Galindo was exacerbated by the Respondent’s statements to employee Pranske linking Galindo’s discharge with his union activities. See *Aldworth Co.*, supra, 338 NLRB at 149; cf. *Hialeah Hospital*, supra; *Desert Aggregates*, 340 NLRB 289 (2003). In fact, Union Organizer Rodehorst testified that three formerly active union supporters told him that they did not attend a union meeting following Galindo’s discharge because they did not want to lose their jobs. As set forth in our decision today in *Desert Toyota II*, supra, the Respondent’s unfair labor practices affected another employee, Charles Frankhouse, who the Respondent warned not to discuss the Union and threatened to segregate from other employees. At least one of the Respondent’s unfair labor practices, the dissemination of an unlawful no-solicitation rule, impacted the employees on a unit-wide basis. Furthermore, the probable impact of unfair labor practices is increased when, as here, a relatively small bargaining unit is involved. See *Justak Bros. & Co., v. NLRB*, 664 F.2d 1074, 1081 (7th Cir. 1981). Moreover, the Respondent made no effort to neutralize the effect of its unlawful actions. Member Liebman concludes that the effect of these violations is unlikely to be dissipated by the Board’s traditional remedies, and would therefore grant the *Gissel* order.

3. Substitute the attached notice for that of the administrative law judge.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge any of you for supporting International Association of Machinists and Aerospace Workers, Local Lodge 744, AFL-CIO (the Union), or any other union.

WE WILL NOT maintain an overly broad or discriminatory no-solicitation rule requiring employees to obtain preauthorization before engaging in any solicitation or distribution and prohibiting employees from engaging in any solicitation or distribution during working hours.

WE WILL NOT ask you to tell us your grievances and impliedly promise to remedy them in order to dissuade you from supporting the Union, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT ask you to watch other employees to learn about their union support or activities.

WE WILL NOT cause you to believe that we are watching you to learn of your union support or activities.

WE WILL NOT tell any employee that we will discharge another employee because of union activities.

WE WILL NOT tell any employee that we have discharged another employee because of union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jorge Galindo full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jorge Galindo whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Jorge Galindo, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

T-WEST SALES & SERVICE, INC. D/B/A/ DESERT TOYOTA

*Joel C. Schochet, Atty.*, for the General Counsel.  
*Douglas R. Sullenberger and James M. Walters, Attys. (Fisher & Phillips, LLP)*, of Atlanta, Georgia, for the Respondent.  
*James Rodehorst and Kenneth Blucher*, Apprentice Organizer and Organizer, respectively, International Association of Machinists and Aerospace Workers, of Wichita, Kansas.

#### DECISION

##### STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on September 10 and 11, 2002.<sup>1</sup> Pursuant to charges filed by International Association of Machinists and Aerospace Workers, Local Lodge 744, AFL-CIO (the Union), the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing (the complaint) on June 27. The complaint alleges that T-West Sales & Service, Inc. d/b/a Desert Toyota (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) and that its alleged conduct is so serious and substantial as to require issuance of a bargaining order.<sup>2</sup>

##### Issues

1. Did Respondent violate Section 8(a)(3) and (1) of the Act by discharging Jorge Galindo (Galindo) on March 22?

2. Did Respondent independently violate Section 8(a)(1) of the Act by the following conduct:

(a) Since January 18, promulgating and maintaining an overly broad and discriminatory no-solicitation rule requiring employees to obtain preauthorization before engaging in any solicitation or distribution and prohibiting employees from engaging in any solicitation or distribution during working hours.

(b) During the period January to April, interrogating employees.

<sup>1</sup> All dates are in 2002, unless otherwise indicated.

<sup>2</sup> Respondent's unopposed post hearing motion to correct the transcript is granted. The corrections are accepted as ALJ Exh. 1.

At the hearing, the General Counsel amended the complaint to include an allegation that Tony Zita is a supervisor within the meaning of the Act, and that he and Vincent Casucci, admitted supervisor, engaged in unlawful interrogation of employees in March. Respondent denied the amended allegations. The General Counsel also amended the unit description to include used car technicians, which Respondent admitted.

(c) During the period January to April, creating an impression of surveillance of employees' union activities.

(d) On March 6, soliciting employee complaints and grievances and thereby promising employees increased benefits and improved terms and conditions of employment if they refrained from supporting the Union.

3. What is the relevant appropriate unit of Respondent's employees for the purposes of collective bargaining within the meaning of Section 9(b) of the Act?

4. Did a majority of the relevant appropriate unit designate and select the Union as its collective-bargaining representative?

5. Is a bargaining order an appropriate remedy?

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a Nevada corporation, is engaged in the business of new car sales and service with a facility in Las Vegas, Nevada (the facility). During a representative 12-month period ending April 29, Respondent annually derived gross revenues of \$500,000 and purchased and received at the facility goods valued in excess of \$50,000 directly from points outside the State of Nevada. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.<sup>3</sup>

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. The Union Campaign

In January, Jack Nugent (Nugent), union grand lodge representative, and James Rodehorst (Rodehorst), union grand lodge apprentice organizer, commenced an organizing campaign among approximately 130 auto dealerships and auto repair shops in Las Vegas, Nevada (Las Vegas). The two representatives, along with 120 union staff employees, hand-billed every truck and new car dealership and auto body shop in the Las Vegas-Henderson area with invitations to a union information meeting on January 13.<sup>4</sup>

Four of Respondent's employees, including Galindo, attended the January 13 union meeting. At the conclusion of the meeting, union representatives seated at a table at the rear of the room gave attendees union authorization cards to fill out and sign. Ramon H. Bautista, Jorge Galindo, and Mark Stine signed authorization cards. All union authorization cards relevant to this case state, "I, the undersigned, an employee of (Company) \_\_\_\_\_ hereby authorize the International

Association of Machinists and Aerospace Workers (IAM) to act as my collective bargaining agent with the company for wages, hours and working conditions." Spaces for name, date, address, department, shift, phone, classification, social security number, and signature follow.

Rodehorst who was in charge of organizing Respondent's employees designated Galindo as contact employee. On January 15, Rodehorst, by telephone, asked Galindo to provide the Union with a list of Respondent's employees, the employee handbook, and any antiunion material the Company might distribute and scheduled a meeting with him for January 17. Galindo, who had previously worked at Desert BMW, arranged a meeting between two employees at Desert BMW and the Union and arranged several meetings with union representatives and other employees.

Galindo and employee Elias Nabizada (Nabizada) attended the January 17 meeting and Nabizada signed a union authorization card in Rodehorst's presence. On February 11, Galindo and 11 other employees attended a meeting with Rodehorst at the Big Inning restaurant. At that meeting, Dana Coffield, Milton Contreras, Richard Drugmand, Kevin Halter, Clayton LaMoya, Carl Nigera, Joel MacRae, Curtis Miller, and James Morgan signed representation cards in the presence of Rodehorst. Galindo attended additional meetings with Rodehorst and employees who signed union authorization cards in Rodehorst's presence: on February 19, Richard Bryant and on February 25, Woodrow Wilson. Respondent's employees who signed authenticated authorization cards are listed below with job classification and date of signing:

<i>Employee Name</i>	<i>Job Classification</i>	<i>Date of Signing</i>
Bautista, Ramon H.	Toyota service tech	January 13 <sup>5</sup>
Bryant, Richard	Toyota service tech	February 19
Canfield, Dana	Toyota service tech <sup>6</sup>	February 11
Contreras, Milton M.	Toyota service tech	February 11
Drugmand, Richard	Toyota service tech	February 11
Galindo, Jorge A.	Toyota service tech	January 13
Halter, Kevin	used car tech	February 11
LaMoya, Clayton G.	Toyota service tech	February 11
MacRae, Joel R.	Toyota service tech <sup>7</sup>	February 11
Magiera, Varl	lube technician	February 11
Miller, Curtis	Toyota service tech	February 11
Moran, James	Toyota service tech	February 11
Nabizada, Elyas	used car tech	January 18
Pranske, Thomas M.	used car tech	February 11
Schwarz, Erick	Toyota service tech	February 11
Stine, Mark	lube technician	January 13 <sup>8</sup>

<sup>3</sup> Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

<sup>4</sup> Of the businesses hand-billed, Respondent, Desert Dodge, and Desert BMW are among 11 dealerships of Desert Auto Group, which is owned by AutoNation. Union guidelines provide that 65 percent of employees in a shop must have signed authorization cards before the Union files a petition, and in the week prior to an election, at least 65 percent of the employees must sign a "vote yes" for the Union to go to election.

<sup>5</sup> Although the card is dated 1-14-02, the actual signing date is January 13.

<sup>6</sup> While Bryant may have been an apprentice technician at some period during the union campaign, the parties stipulated that he was appropriately in any auto service technician unit.

<sup>7</sup> Although employed as an apprentice technician for some part of the relevant period, the parties agree that MacRae was appropriately in any auto service technician unit.

Wilson, Woodrow A. Toyota service tech February 25

On March 20, Rodehorst and Union Representative Mike Warble gave Galindo invitation cards to distribute to Respondent's technician employees.<sup>9</sup> In addition to time, location, and telephone numbers, the cards read:

Automotive Service Technicians Lunch,  
Sunday, March 24<sup>th</sup>  
I.A.M. & A.W. invites you to attend your union  
recognition commitment meeting.

Employees Miller, Halter, and Drugmand told Rodehorst they planned to attend the March 24 meeting.

On March 22, Galindo informed Rodehorst, by telephone, that Respondent had fired him. Thereafter, Rodehorst spoke to Miller, Halter, and Drugmand, all of whom declined to attend the March 24 meeting, saying they did not want to lose their jobs. None of Respondent's employees attended the March 24 meeting. Thereafter, although some employees met individually with Rodehorst, he was unable to persuade any of Respondent's employees to meet with him in a group or to continue organizing efforts.

#### B. The 8(a)(1) Allegations

##### 1. No-solicitation rule

The complaint alleges that since at least January 18, Respondent has promulgated and maintained an overly broad and discriminatory no-solicitation rule.

Since 2000, Respondent has maintained an employee handbook entitled "AutoNation Associate Handbook, Human Resources Policies and Procedures, 2000 edition." In pertinent part, the handbook reads:

##### Selling or Soliciting on Company Property

Unless it has been authorized in advance by an Officer of the Company, you may not solicit for organizations, sell goods or services, or distribute catalogs or literature of any kind on Company property during your working hours.

The Board has consistently ruled that prohibitions on "distribution of literature are presumed valid unless they extend to activities during nonworking time and in nonworking areas." *Hale Nani Rehabilitation & Nursing Center*, 326 NLRB 335 (1998) [citations omitted].

The Board considers that any "rule prohibiting distribution of literature on employees' own time and in nonworking areas is presumptively invalid. [Citations omitted]." *TeleTech Holdings, Inc.*, 333 NLRB 402, 403-404 (2001). In *Our Way, Inc.*, 268 NLRB 394 (1983), the Board enunciated the principle that in solicitation rules, the term "working time" is presumptively

valid because it indicates with sufficient clarity that employees may solicit on their own time, while the term "working hours" is presumptively invalid because it connotes periods from the beginning to the end of work shifts, which includes the employees' own time, such as lunch and breaks. The mere existence of an overly broad rule tends to restrain and interfere with employees' rights under the Act, even if unenforced. *Brunswick Corp.*, 282 NLRB 794, 795 (1987). Applying these precepts, it is clear that Respondent's no-solicitation rule is facially overbroad and presumptively unlawful. Accordingly, I find that Respondent's promulgation and maintenance of an overly broad and discriminatory no-solicitation rule violated Section 8(a)(1) of the Act.

##### 2. Interrogation, solicitation of grievances, impression of surveillance, and coercive statements

The complaint alleges that Pat Burke (Burke), Respondent's service director, during the period January through April, interrogated employees about their and other employees' union activities and created an impression that the employees' union activities were under surveillance.

In January, Burke told service advisors<sup>10</sup> during a weekly meeting attended by Vincent Casucci (Casucci), service director, that the Union was coming into town to try to organize. Burke asked the service advisors to let him know if they heard anything among the technicians. At a later meeting, Burke asked if the advisors had heard anything about what was going on. At one of the meetings, either Burke or Casucci said that Galindo was promoting the Union and taking people to a union meeting. After Burke ended his employment with Respondent on January 29, Casucci held daily service advisor meetings. At one of them, he asked the service advisors if they had heard anything about the Union. When all answered negatively, Casucci said, "Yeah, I think it's pretty much dead."

Burke's solicitation of employees to report on the union activity of others is a violation of the Act. His and Casucci's interrogation of employees about the union activities of others also violates the Act. Further, the two supervisors' statements to the service advisors created the impression of unlawful surveillance, another violation of the Act. *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001). Accordingly, I find that by interrogating employees, by soliciting employees to engage in surveillance of other employees' union activity, and by creating the impression that employees' union activity was under surveillance, Respondent violated Section 8(a)(3) of the Act.<sup>11</sup>

The complaint alleges that Robert Carmendy (Carmendy), general manager, on March 6, interrogated employees and so-

<sup>8</sup> This card is also dated 1-14-02; credible testimony puts the signing date on January 13. Stine ended his employment on February 7. The parties agree that his card should not be counted.

<sup>9</sup> In its brief, Respondent states that between February 25 and March 20 the Union had no "further contact with any Desert Toyota employee for almost a full month." Respondent has inadvertently misstated the facts. Rodehorst's testimony was that he had no physical meeting with any of Respondent's employees between February 25 and March 20. There is no evidence that either the Union or the employees lost interest in the union movement.

<sup>10</sup> Service advisers (writers) are employed in Respondent's automotive service department. Among other duties, they create and distribute work orders to service technicians.

<sup>11</sup> The complaint does not specifically plead as a violation Respondent's conduct in soliciting employees to engage in surveillance of employees' union activities. As this issue has been fully and fairly litigated and is closely connected to the impression of surveillance allegation of the complaint, I may appropriately find a violation. See *Gallup, Inc.*, 334 NLRB 366 (2001); *Letter Carriers Local 3825 (Postal Service)*, 333 NLRB 343 (2001); *Parts Depot, Inc.*, 332 NLRB 733 (2000).

licited employee complaints and grievances, thereby promising increased benefits and improved terms and conditions of employment if employees refrained from supporting the Union.

Following notification in January that he had passed two certification tests, Galindo asked Casucci if he would receive a pay review. Casucci said he would discuss it with Galindo later. By mid-March, Galindo had heard nothing from Casucci about a pay raise. Galindo went to Bob Carmendy (Carmendy), general manager, and told him of the test results and of Casucci's failure to respond. Carmendy said he would talk to Casucci about the raise and asked what Galindo thought could be done to improve the shop. Galindo complained that services were being cut, and Carmendy said that was information Respondent could do something about. Carmendy asked what Galindo thought about the Union. Galindo said he had attended the first union meeting.

Carmendy's inquiry as to what Galindo thought of the Union can only have been an attempt to find out if Galindo supported the Union in violation of Section 8(a)(3) of the Act. *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77 (1999). Carmendy's discussion of how the shop could be improved constituted solicitation of grievances with an implied promise of remedying those grievances. The clear motivation of the solicitation and promise of remedy, coupled as they were with a question about Galindo's union interest, was to discourage support of a union. Such conduct violates the Act. *Insight Communications Co.*, 330 NLRB 431, 457 (2000); *Palm Garden of North Miami*, 327 NLRB 1175 (1999). It does not matter that employee complaints were not remedied. "[The] solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances." *Clark Distribution Systems*, 336 NLRB 747, 748 (2001);<sup>12</sup> *Hospital Shared Services*, 330 NLRB 317 (1990). Grievance solicitation during an organizational campaign creates a "compelling inference," that the employer seeks to influence employees to vote against union representation. *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999).<sup>13</sup> Accordingly, I find that Carmendy's interrogation, solicitation of complaints and grievances, and implied promise of benefits violated Section 8(a)(1) of the Act.

The complaint, as amended, alleges that Tony Zita (Zita), Respondent's reconditioning manager, in about March, interrogated employees in violation of Section 8(a)(1) of the Act. Respondent has denied that Zita was a supervisor during that period.

Section 2(11) of the Act defines a "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. "The possession of even one of those attributes is enough to convey supervisory status, provided the authority is

exercised with independent judgment, not in a merely routine or clerical manner." *Arlington Electric, Inc.*, 332 NLRB 845 (2000), quoting *Union Square Theatre Management*, 326 NLRB 70, 71 (1998). Zita did not testify. Credible testimony establishes that at relevant times, Zita directly supervised the porters and the used car technicians. Zita had the authority to and did hire porters. Moreover, Zita exercised independent judgment in assigning and directing work, interrupting one repair job to assign another. Zita's work assignments and direction exceeded the merely routine or clerical. I find that Zita was a supervisor within the meaning of Section 2(11) of the Act during relevant periods.

In February or March before Galindo was terminated, Zita asked used car technician, Thomas Pranske (Pranske), if either he or Galindo were involved in the Union. Pranske testified that on March 21, the day before Respondent terminated Galindo, Zita called Pranske into his office. Casucci was present. The two supervisors asked Pranske if he was involved in organizing the Union, which he denied. Zita had earlier vouched for Pranske's noninvolvement, but Casucci said he wanted to hear it from Pranske. The supervisors then asked Pranske if Galindo was involved in organizing the Union, and Pranske said he was. Casucci said, "Okay. That's what we needed to know." Later that same day, Zita told Pranske that Carmendy said Respondent would have to fire Galindo. On the day following Galindo's termination, Zita told Pranske that the problem with the Union was taken care of.

Casucci denied ever having the conversation with Pranske described above. Casucci said that Pranske came to him in February and volunteered that he was attending union meetings to hear what the Union had to say. According to Casucci, he told Pranske it was not a problem.

Respondent argues that Pranske's testimony is not credible. I note Pranske is still employed by Respondent, and his testimony has the potential to damage what he described as a "good relationship" with his supervisor. Pranske's testimony adverse to Respondent was given against self-interest, a factor I find significant in favorably determining Pranske's credibility. Although Pranske was nervous while testifying, I found him to be sincere and reliable. Moreover, Respondent failed to call Zita as a witness. The failure to examine Zita, who is still employed as Respondent's supervisor and is presumably a favorable witness, about statements he is accused of making gives rise to the "strongest possible adverse inference against Respondent" regarding the statements. *Flexsteel Industries*, 316 NLRB 745, 758 (1995). Although Casucci specifically denied questioning Pranske, he did not deny questioning service advisors. It is uncontroverted that Casucci actively interrogated the service advisors about other employees' union activities to which he was hostile. Casucci was not averse to questioning employees about the union activities of others, and it is reasonable to believe Pranske's account of additional questioning. Considering the testimony overall, I credit Pranske.

Both Zita and Casucci interrogated Pranske about his and Galindo's union activities. In determining the unlawfulness of employee interrogation, the Board looks at whether under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with employees in the exercise of

<sup>12</sup> Quoting *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), enf. mem. 23 F.3d 399 (4th Cir. 1994).

<sup>13</sup> Reiterated in *MacDonald Machinery Co.*, 335 NLRB 319 (2001).

their Section 7 rights. *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Emory Worldwide*, 309 NLRB 185, 186–187 (1992). “The factors to be considered in assessing whether an interrogation is unlawful include: background, nature of information sought, identity of the questioner, place and method of interrogation, whether a valid purpose for the interrogation was communicated to the employee, and whether the employee was given assurances of no reprisals.” *Performance Friction Corp.*, supra, citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Employer hostility is a significant background consideration. See *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). All factors of the instant interrogations emphasize their coercive nature. Pranske was directly interrogated in implicitly hostile circumstances, the only possible basis for which was Respondent’s unspoken desire to identify and penalize union organizers. Accordingly, I find Zita and Casucci’s interrogations of Pranske to be violations of Section 8(a)(1) of the Act.

Further, although not alleged, I find Zita’s statements to Pranske that Respondent would have to fire Galindo and, following Galindo’s discharge, that Respondent had taken care of the union problem to be coercive. Zita’s statements linking Galindo’s discharge to his protected support of the Union were coercive and independently violated Section 8(a)(1). See *Joseph Stallone Electrical Contractors*, 337 NLRB 1139 (2002); *Benesight, Inc.*, 337 NLRB 282 (2001), citing *Sands Hotel & Casino*, 306 NLRB 172, 184 (1992), enf. mem. 993 F.2d 913 (D.C. Cir. 1993).<sup>14</sup>

### C. The 8(a)(3) Allegation

The complaint alleges that Respondent discharged Galindo because he engaged in union activities and to discourage other employees from engaging in such activities.

Except for a 6-month period in 2000 when Galindo worked for Desert BMW, Galindo worked continuously for Respondent as a Toyota technician from February 1997 until his discharge on March 22. In January, Casucci told Galindo that he was considering making Galindo a team leader. In January or February, Casucci told another employee in Galindo’s presence that his “top guy was Jorge.” On another occasion, Casucci praised Galindo’s “up-sales.”<sup>15</sup>

As set forth above, Galindo was the Union’s contact employee at Respondent. In connection with his earlier-described union organizational efforts, Galindo, on March 21, passed out about 22 union invitation cards to other employees at work. When Galindo arrived at work the next day, March 22, Casucci asked Galindo to join him in his office where parts manager, Scott Waddell, was also present. Casucci said to Galindo, “I’ve got some bad news to tell you. I’m going to have to let you go because we’re trying to reduce costs by April 1st, and . . . you’ve gotten to a point where you [have a] bad attitude and [your] work performance is bad and productivity.”

Casucci mentioned an MR-2 model car that Galindo had worked on in November or December 2001, which had thereafter broken down in California. Casucci also criticized work Galindo had performed on a Supra model car in January. Casucci said the matter was not personal, that “it came from up front.” Casucci suggested Galindo apply at a Toyota dealership due to open in August. According to Galindo, prior to his discharge date, Casucci had never mentioned any problem with Galindo’s work on either the MR-2 or the Supra, and he had never complained to Galindo about his attitude.

Casucci testified that beginning in early 2002, Galindo asked him for a raise on three occasions. Each time, according to Casucci, he told Galindo that because he was not very communicative and because of his work performance, Casucci did not think he was ready for a raise.<sup>16</sup> At the beginning of March, Carmendy told Casucci that Galindo had approached him about a raise. Casucci was “furious” because Galindo had gone over his head. Because of that, because of performance issues, and because Galindo continued to have a “very down, dark attitude” and would not “respond” to him, in the latter part of March, Casucci decided to terminate Galindo. Concerning Galindo’s performance, Casucci testified that Galindo’s low labor hours and a customer service index maintained by Toyota Company based on customer surveys (CSI), which ranked Galindo as third from the bottom for the year 2001, were performance concerns. According to Casucci, he terminated Galindo “basically on his attitude, his CSI, and his labor hours. Casucci said that at the termination interview, he listed these reasons but did not “[get] incredibly specific.” During cross-examination, Casucci abridged his testimony somewhat and said that he terminated Galindo because “we couldn’t communicate and couldn’t get along.” Casucci did not mention reduction in force as a basis for the discharge.

On Galindo’s termination form, Casucci marked the “reason for termination” portion with both “Reduction In Force” and “Other,” to which he added “overall job performance—decline in job performance, attitude.” Under the “employee evaluation” portion, Casucci marked Galindo as “fair” in attendance and initiative, “satisfactory” in cooperation and quality of work, and “good” in job knowledge. No “unsatisfactory” rating was marked. As to “recommendation,” Casucci marked “with some reservation.” As to “rehire?” Casucci marked “yes.”

I do not find Casucci’s testimony of Respondent’s basis for terminating Galindo to be convincing. Much of his testimony was inherently incongruent. Casucci testified that although he was unhappy with Galindo and his attitude as early as November 2001; he testified he was “furious” with Galindo for going over his head in beginning of March. However, Casucci did not consider firing Galindo until the later part of March, and he did not look at his CSI score until then. Casucci testified that Galindo’s CSI score was “incredibly important” and a factor in

<sup>14</sup> I may find and recommend a remedy for these violations even in the absence of allegations or amendments of the complaint as these issues have been fully litigated and are closely connected to the subject matter of the complaint. See *Gallup, Inc.*, supra; *Letter Carriers Local 3825*, supra; *Parts Depot*, supra.

<sup>15</sup> “Up-sales” are sales of additional automotive services.

<sup>16</sup> In an affidavit given to Region 28 during its investigation of the charges relevant to Galindo’s request for a raise, Casucci stated, “When Jorge came to me to ask for a pay increase, I told him that I thought his seventeen dollar per hour rate was appropriate for his skill level and overall effort.” The affidavit does not mention Casucci’s dissatisfaction with Galindo’s communication efforts.

his discharge, but, under cross-examination, Casucci admitted that he never discussed Galindo's CSI score with him.<sup>17</sup> Further, Casucci admittedly never warned or disciplined Galindo in any way for his "bad attitude."<sup>18</sup> Although Casucci stressed Galindo's attitude as a basis for termination, the termination form reports Galindo's cooperation as good, which is inconsistent with a bad attitude and a failure to communicate. Casucci testified that in February he received information that a Toyota Galindo had worked on in November had broken down in California, assertedly as a result of Galindo's poorly performed repairs. However, Casucci never brought the matter to Galindo's attention until he fired him. Finally, the termination form cited "Reduction in Force" as a basis for discharge, which basis Respondent apparently later abandoned.<sup>19</sup> In determining the lawfulness of Galindo's discharge, I have considered the above inconsistencies as well as credited testimony that Casucci, through unlawful interrogation, discovered Galindo was the employee most responsible for the union organizing effort and that Respondent's supervisor, Zita, stated Galindo would be fired for his union support. I find that Casucci's asserted reasons for the discharge of Galindo are pretextual. The real basis for Galindo's discharge was his prominent role in the union organizing effort.

As Respondent's stated reasons for Galindo's discharge are pretextual, it is not necessary to "go through the burden-shifting inquiry as to whether [Galindo] would have been discharged had he not engaged in union activity, as required by *Wright Line*."<sup>20</sup> *Sodexo Marriott Services*, 335 NLRB 538 (2001) [citations omitted]. However, if I were to apply a *Wright Line* analysis, I would find the General Counsel met his burden of showing that Galindo's protected conduct was a motivating factor in Respondent's decision to discharge him. I would also find that Respondent did not meet its shifted burden to demonstrate that the same action would have taken place even in the absence of the protected conduct. Accordingly, I find that Respondent violated Section 8(a)(3) of the Act by discharging Galindo.

#### D. Bargaining Order as Remedy

##### 1. Appropriate unit

The parties dispute the composition of an appropriate unit herein. Although the complaint described the appropriate unit as including lube technicians, at the hearing and in brief, the

General Counsel contended that a craft unit of automotive service technician employees performing skilled mechanical work—Toyota technicians and used car technicians—is the appropriate unit. Respondent asserts that the appropriate unit must include, in addition to Toyota and used car technicians, detailers, accessory installers, window tinters, lube technicians, and porters.

Respondent's service technicians work under the overall supervision of a service manager. The classification includes Toyota technicians, used car technicians, and accessory installers, all of whom perform mechanical work on vehicles although their skills, duties, sophistication, number and cost of tools, and pay differ. Toyota technicians work on Toyota vehicles; used car technicians work on all vehicle makes, and accessory installers install optional items to vehicles such as spoilers, audio systems, alarms, pickup bed liners, and running boards. They also tint vehicle windows, which occasionally requires vehicle door and interior trim removal.<sup>21</sup> Respondent pays all service technicians on a flat rate system based on a codified estimate of the time required to complete specific tasks. Quick lube technicians perform minor maintenance and vehicle inspection along with changing oil and other fluids and rotating tires. The service technicians and quick lube technicians own the tools they use except for some specialized instruments that Respondent furnishes, and wear uniforms distinctive from other employees.<sup>22</sup>

Predelivery inspection technicians (PDI) test systems of newly delivered Toyotas. Detailers clean vehicles, including polishing, waxing, and steam cleaning engines. Service porters are responsible for parking and retrieving customer vehicles, and perform some janitorial duties. They may perform minor vehicle trim work and assemble office furniture as needed.

The Board "consistently has found that mechanics possessing skills and training unique among other employees constitute a group of craft employees within an automotive or motor service department and therefore may, if requested, be represented in a separate unit, excluding other service department employees." *Dodge City of Wauwatosa, Inc.*, 282 NLRB 459 fn. 6 (1986) [citations omitted.] In *Fletcher Jones Chevrolet*,<sup>23</sup> the Board found that "service technicians constitut[ed] a separate appropriate craft unit" within an automotive department because they performed mechanical work and "[t]heir skills [were] dissimilar from the skills employed by the other service department employees, such as the service porters . . . [and] 'get-ready technicians . . . [who] road test as well as visually inspect the automobile and its accessories [upon sale].'"

In light of the Board's craft unit determinations in the automotive repair and sales industry, I find that an appropriate unit herein is a craft unit of employees who perform mechanical work at Respondent's facility. I find that PDI employees, de-

<sup>17</sup> Two employees, Stine and Kenneth Fruend, Toyota technician, received lower CSI ratings than Galindo, but there is no evidence Casucci ever discussed the ratings with either employee.

<sup>18</sup> Casucci testified that he spoke to Galindo about his attitude, telling him it needed to change, but as to specific conversations with Galindo regarding attitude, Casucci testified only that he said, "Jorge, how you doing? What's going on, Jorge? Anything I can do to help you? What's wrong? What's the problem?" I specifically discount Casucci's testimony that he said anything to Galindo about his attitude being a problem.

<sup>19</sup> Respondent did not raise any reduction-in-work-force defense in its brief, and Casucci did not testify that lack of work formed any ground for Galindo's discharge.

<sup>20</sup> 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>21</sup> Although some testimony referred to "window tinters" as a separate classification, it appears that accessory installers also perform window tinting.

<sup>22</sup> Although the accessory technicians are issued the same uniforms as other service technicians, they choose to wear their own clothing.

<sup>23</sup> 300 NLRB 875, 876 (1990), distinguished by *Interstate Warehousing of Ohio*, 333 NLRB 875 (2001).

tailers, and porters do not perform mechanical work and should not be included in a craft unit.

The appropriate unit herein is:

All full-time and regular part-time service technicians, including Toyota technicians, used car technicians, accessory installers, and lube technicians employed by Respondent at its Las Vegas, Nevada facility, excluding all other employees, office clerical and professional employees, guards and supervisors as defined in the Act.<sup>24</sup>

It remains to determine if a majority of unit employees designated and selected the Union as their collective-bargaining representative during the union campaign among Respondent's service technician employees. All authorization card signers were employed in unit classifications. The last authorization card was signed February 25, and no signer revoked his authorization card. Employee payroll records show, in the following periods, the number of unit employees. The number of authorization card signers employed during those same periods is also set forth:

Latter half of February	30 unit employees	16 card signers
First half of March	30 unit employees	16 card signers
Latter half of March	31 unit employees	16 card signers

At all relevant times—particularly on March 22, the date of Galindo's discharge—the Union represented a majority of the unit employees for collective-bargaining purposes.

## 2. The propriety of a bargaining order

In *Gissel Packing Co.*, 395 U.S. 575 (1969), The Supreme Court identified two categories of cases in which a bargaining order is appropriate: Category I cases are exceptional situations involving outrageous and pervasive unfair labor practices that traditional remedies cannot resolve and which make a fair election impossible. Category II cases involve unfair labor practices that are less extraordinary but that nonetheless have a tendency to undermine majority support and impede the election process. As such unfair labor practices render the possibility of a fair election slight, "employee sentiment once expressed through cards would . . . be better protected by a bargaining order."

The instant matter meets the standards for a *Gissel* category II bargaining order. In its hunt for the most prominent employee or employees supporting the Union, upper-level management of Respondent engaged in widespread interrogation at weekly service advisor meetings, solicited service advisors to observe and report employees' union activities, and made specific individual inquiry of other employees. Once Respondent identified Galindo as the chief union proponent, Respondent fired him in a manner so devoid of valid basis that its action must have been calculated to send a warning message to all employees of the consequences of union adherence. In fact, Respondent was so little concerned about concealing its unlawful motive for discharging Galindo that lower-level supervisor,

Zita, was well aware of it and declared it to Pranske. The discharge of leading union adherents has an especially pernicious effect on other employees. *National Propane Partners L.P.*, 337 NLRB 1006 (2002). Awareness of the motivation behind Galindo's termination was general, and its impact was immediate. Three employees who served as union organization team leaders declined to attend the March 24 union meeting, saying they did not want to lose their jobs. Respondent's overt unlawful conduct so intimidated formerly active union supporters that they continued to refuse to meet as a group with union representatives. In these circumstances, the possibility of erasing the effects of Respondent's violations is slight, and the holding of a fair election is improbable. See *Joseph Stallone*, supra.

Respondent argues that no obligation to bargain can be asserted where, as here, the Union did not demand recognition or bargaining. As counsel for the General Counsel points out, the Board noted in *Ludwig Fish & Produce, Inc.*,<sup>25</sup> 220 NLRB at 1086-1087: "There is nothing in *Gissel* which conditions the bargaining order remedy upon a demand for bargaining." I find that Respondent's unfair labor practices have rendered "a fair and reliable election" impossible. Accordingly, having determined that the Union enjoyed majority status in the appropriate unit, I find that a bargaining order is an appropriate remedy in this case.

## CONCLUSIONS OF LAW

### 1. Respondent violated Section 8(a)(1) of the Act by:

(a) Promulgating and maintaining an overly broad and discriminatory no-solicitation rule requiring employees to obtain preauthorization before engaging in any solicitation or distribution and prohibiting employees from engaging in any solicitation or distribution during working hours.

(b) Interrogating employees about their union activities or about the union activities of other employees.

(c) Soliciting employees to engage in surveillance of other employees' union activities.

(d) Creating an impression that Respondent was engaging in surveillance of employee union activities.

(e) Impliedly promising benefits to employees to induce them to refrain from engaging in union activities.

(f) Coercively telling an employee that another employee would be discharged because of his union activities.

(g) Coercively telling an employee that another employee had been discharged because of his union activities.

2. Respondent violated Section 8(a)(3) and (1) of the Act on March 22 by discriminatorily discharging and refusing to reinstate Jorge Galindo.

3. The following unit of Respondent's employees is appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act: all full-time and regular part-time service technicians, including Toyota technicians, used car technicians, accessory installers, and lube technicians employed by Respondent at its Las Vegas, Nevada facility; excluding all

<sup>24</sup> While the parties' positions on what constitutes an appropriate unit herein have not been static, that does not affect the issue of whether a majority of employees in an appropriate unit designated and selected the Union as their collective-bargaining representative. *Aldworth Co., Inc.*, 338 NLRB 137, 154 (2002).

<sup>25</sup> Initial Decision and Order at 220 NLRB 1086 (1975); Supplemental Decision and Order at 221 NLRB 1306 (1975); remanded on other grounds 544 F.2d 519 (7th Cir. 1976); Second Supplemental Decision and Order at 233 NLRB 571 (1977).

other employees, office clerical and professional employees, guards and supervisors as defined in the Act.

4. The Union has been at all times since March 22, and is, the exclusive bargaining representative of the employees in the unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged Jorge Galindo, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The recommended Order will also provide that Respondent bargain in good faith with the Union as the exclusive collective-bargaining representative of the above-described unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>26</sup>

#### ORDER

The Respondent, T-West Sales & Service, Inc. d/b/a Desert Toyota, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for supporting International Association of Machinists and Aerospace Workers, Local Lodge 744, AFL-CIO, and to discourage employees from engaging in these activities.

(b) Promulgating and maintaining any overly broad and discriminatory no-solicitation rule requiring employees to obtain preauthorization before engaging in any solicitation or distribution and prohibiting employees from engaging in any solicitation or distribution during working hours.

(c) Coercively interrogating any employee about union support or union activities or about the union activities of other employees.

(d) Soliciting employees to engage in surveillance of other employees' union activities.

(e) Creating an impression that Respondent is engaging in surveillance of employee union activities.

(f) Impliedly promising benefits to employees to induce them to refrain from engaging in union activities.

<sup>26</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Coercively telling any employee that another employee would be discharged because of his union activities.

(h) Coercively telling any employee that another employee had been discharged because of his union activities.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time service technicians, including Toyota technicians, used car technicians, accessory installers, and lube technicians employed by Respondent; excluding all other employees, office clerical and professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, offer Jorge Galindo full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Jorge Galindo whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(d) Remove from its files any reference to Jorge Galindo's unlawful discharge and thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."<sup>27</sup> Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respon-

<sup>27</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

dent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since January 1, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.